

DECISION

24448
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-206535**DATE:** March 8, 1983**MATTER OF:** Physicians Comparability Allowance**DIGEST:**

As the result of misinformation two Panama Canal Commission physicians, whose earlier service agreements expired September 30, 1981, did not execute new service agreements entitling them to a physicians comparability allowance under 5 U.S.C. section 5948 until March 8, 1982. The agreements may be regarded as in effect retroactive to October 1, 1981. Legislation enacted December 29, 1981, extending authority to execute new agreements to period subsequent to September 30, 1981, was intended to be given effect retroactive to October 1, 1981, and physicians' failure to execute new agreements until March 8, 1982, falls within standards set forth in B-192338, September 19, 1978, in which service agreements executed under the similar authority of 37 U.S.C. 313 (1976) were held to be retroactive.

Mr. D. P. McAuliffe, Administrator, Panama Canal Commission (Commission), has requested our decision as to whether the Commission may pay two of its employee physicians comparability allowances for service prior to March 7, 1982, the date they executed service agreements required by 5 U.S.C. 5948 (Supp. IV, 1980), as amended by the Act of December 29, 1981, Public Law 97-141, 95 Stat. 171. For the reasons stated below, we conclude that the employees may be paid the physicians comparability allowance for that period retroactive to October 1, 1981.

Section 5948(a) provides that the head of an agency:

"* * * may enter into a service agreement with a Government physician which provides for such physician to complete a specific period of service in such agency in return for an allowance for the duration of such agreement in an amount to be determined by the agency head and specified in the agreement * * *."

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Section 5948(d) originally provided that no agreement could be entered into later than September 30, 1979, or cover a period of service beyond September 30, 1981. Federal Physicians Comparability Allowance Act of 1978, Public Law 95-603, 92 Stat. 3018.

Through September 1981 the two Commission physicians received physicians comparability allowances under service agreements due to expire September 30, 1981. On September 10, the physicians brought to the attention of their Personnel Director, by means of a memo, the impending expiration of their service agreements. In response to the Personnel Director's inquiry, a report from Commission officials in Washington, D.C. indicated that legislation on comparability allowances was pending in Congress, and that such legislation included a retroactivity provision.

In fact the Act had already been amended to permit physicians to execute new agreements through September 30, 1981, for payment of allowance through September 30, 1983. The pending legislation involved yet a further extension of that authority. However, it was not until February 1982 that the Commission learned that in 1979 Congress had amended the original act to authorize payment of the allowance through September 30, 1983, provided a service agreement had been entered into before September 30, 1981. Act of December 29, 1979, Public Law 96-166, 93 Stat. 1273. At that time, it was also discovered that the 1981 amendment, Public Law 97-141, had been enacted on December 29, 1981, permitting service agreements to be entered into after September 30, 1981, and until September 30, 1983, for payment of allowances through September 30, 1985. But, during the period from October 1, 1981, to December 29, 1981, there was no authority to execute agreements.

Although the physicians executed new service agreements on March 8, 1982, the Administrator informs us that it was the Commission's intent to have initiated new service agreements with the physicians by September 30, 1981, had the Commission believed it possible under the law. However, as a result of administrative error as to the state of the law, the physicians did not enter into agreements before September 30, 1981. There was no authority to enter into new agreements between October 1 and December 29, 1981.

Due to a delay in learning of the December 29, 1981, amendment, new agreements were not entered into until March 8, 1982, and the physicians did not receive an allowance for the period from October 1, 1981, to March 7, 1982. Since the physicians were denied the opportunity to enter new service agreements because of the administrative error, the Administrator asks whether their service agreements may be regarded as effective for the period from October 1, 1981, to March 7, 1982.

The legislative history of Public Law 97-141 reflects a congressional intent that certain service agreements entered into subsequent to September 30, 1981, be given effect retroactive to that date. As previously indicated, the authority to enter service agreements was to expire on September 30, 1981. On July 30, 1981, S. 1551 was introduced to extend this authority to September 30, 1983. However, that bill was not enacted into law until December 29, 1981. On December 15, 1981, Senator Stevens, Chairman of the Subcommittee of the Committee on Governmental Affairs to which the bill had been assigned, specifically addressed the problem of a potential interruption in allowances:

"* * * The committee has taken note of the fact that authority to enter into service agreements under this act expired on September 30 of the current year. By extending this date to September 30, 1983, it is the understanding of committee counsel and it is the intent of this committee as well as the intent of the House Post Office and Civil Service Committee that no civil service physician be denied bonus allowances for the time which expired following September 30, 1981, and the eventual date of enactment of this legislation. By extending the period during which agencies may enter into service agreements from September 30, 1981, to September 30, 1983, it is our intent that all of the time between those dates be covered by this legislation and that bonuses for this time should be paid." [127 Cong. Rec. S. 15268 (daily ed. December 15, 1981).]

Senator Mathias then added that:

"Finally I would also like to echo my understanding of the applicability of the legislation for the weeks that have passed since September 30, 1981. Clearly, the intent of Congress is that no bonus allowance be denied physicians who have entered into contracts since that date. Thus, with this intent of Congress clarified to authorize bonus allowances for the time period between September 30, 1981, and the date of implementation of this act, I am confident that any question about retroactivity can be answered." Id.

Consistent with these remarks and with the language of Public Law 97-141 which authorizes the execution of new agreements during an additional 2-year period beginning on October 1, 1981, prior to its enactment, we conclude that service agreements executed within a reasonable period subsequent to December 29, 1982, may be given retroactive effect to October 1, 1982, provided the other conditions of entitlement are met during that period.

The fact that new agreements could have been executed on or before September 30, 1981, to cover the period in question does not change the retroactive effect to be given the new authority enacted on December 29, 1981. For the period from October 1, 1981, to December 29, 1981, authority to enter into new agreements had lapsed and it was the intent of Congress to continue authority to enter into agreements without interruption.

In this case, where the record indicates that the physicians would have executed an agreement in timely fashion, i.e., before October 1, 1981, but for lack of information as to the existence of authority to enter into such an agreement, the agreements executed on March 8, 1982, may be given effect retroactive to October 1, 1981. We find precedent for so holding in our

decision Matter of Variable Incentive Pay Contracts, B-192338, September 19, 1978, involving variable incentive pay contracts entered into by commissioned officers of the Public Health Service under 37 U.S.C. 313 (1976). In that decision we stated:

"* * * Thus it would appear that notwithstanding the language of a statute requiring the execution of a written agreement as a condition precedent to receiving some benefit or allowance, the failure to execute a written agreement will not necessarily preclude payment of the benefit or allowance if the party concerned is otherwise qualified, has substantially complied with all other requirements and there is evidence, either expressed or implied, of an intent by the member to timely execute such an agreement. Stated another way, if the failure to execute was due to lack of information or misinformation and it can be shown that had the agreement been timely presented to the member he would have executed it, the substantial compliance with the requirements of the statute may be inferred. This is not to say the requirement to execute an agreement will be considered in all circumstances as perfunctory or of no value. Where for instance a member is fully aware of the requirement for a written agreement but refuses to execute it thus leaving open his options and leaving the Government unsure of his future services in a critically needed skill, he should not be permitted at a later time to claim retroactive payments of the benefit or allowance. * * *"

This holding is consistent with Matter of Groff, B-186213, August 3, 1976, and similar decisions concerning service agreements required to be executed in connection with home leave travel. Compare Matter of Konnagan, B-205453, August 3, 1982.

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Accordingly, the service agreements executed by the two physicians in March 1982 may be regarded as in effect retroactive to October 1, 1981, and the physicians comparability allowance may be paid retroactive to that date.

for Milton J. Acsela
Comptroller General
of the United States